

W 0293

SERVICE AGREEMENT  
General Terms & Conditions

This Wireless Residential Services Agreement is an Agreement ("Agreement") between you and the Universal Services ("Service"). Unit, as used in this Agreement, means your Universal Services communication equipment, including any additional or replacement equipment. By activating Service with us, you acknowledge that you have read and agree to the terms of this Agreement.

1. **Availability.** Service representations are offered only as estimates; actual service quality and availability may vary. You are responsible for ensuring that you have the pre-installed software necessary to utilize the Service. Service may only support data transfer speeds up to 2,400 baud. Service is subject to termination limitations caused by atmospheric or geographic conditions, and may be temporarily refused, limited, interrupted, or curtailed as necessary or appropriate for the proper operation of the Service. We are not liable for any Service failures, including without limitation the failure of a 9-1-1 emergency call to be connected or completed (see Paragraph 10).

2. **Use of Service.** You agree not to use the Service (whether for public or otherwise) for any purpose other than the limited purpose of making a telephone call or in such a way as to cause damage to our business, reputation, employees, facilities, or to the public generally. You have no proprietary or ownership right to or interest in a specific telephone number ("Number") assigned to your Unit. We may change your Number assignment at any time. This may not use or assign the Number to any other Unit or electronic serial number ("ESN"). You shall not program any other Number into your Unit and any act shall be deemed to be a breach of this Agreement. The Unit is intended to remain stationary. Removing the Unit from the location where it was installed by us is a violation of this Agreement and may result in substantial additional fees to you. Failure of the Unit, under termination of this Agreement.

3. **Termination.** (a) This Agreement begins on the date Service is activated to your Unit and continues until terminated in the manner provided herein. You may terminate this Agreement by providing 30 days written notice to us at our address of record. Regardless of your plan, we may terminate this Agreement upon notice to you. We may increase the charges for Service or modify these terms and conditions at any time, upon advance written notice to you. You may, upon receipt of notice of the modification, terminate this Agreement in the manner set forth in this Agreement. (b) If you use the Service after we have given you notice shall mean that you agree to such amendment. If we increase such charges and/or modify these terms and conditions and you do not terminate the Agreement within 14 days after notice is given, you must pay us any additional charges even if you paid for the Service in advance.

4. **Default/Termination.** We may discontinue Service and/or terminate this Agreement without prior notice to you if you do not pay any sum when due, breach any representations you made to us in this Agreement, fail to perform any of your obligations set forth in this Agreement or in any other agreement between you and us, use your Unit or Service in any abusive manner in any way that damages or interferes with us, or become the subject of any proceeding under the Bankruptcy Code or become insolvent. In any such case, you shall remain responsible for payment of all charges due to us under this Agreement, all charges (including, without limitation, all unpaid installment amounts) will be immediately due and payable, in the event of your default, you will reimburse us for our attorneys' fees, costs, investigation, collection and similar expenses incurred by us in the enforcement of any rights or privileges hereunder. If this Agreement is terminated because of your default, we may keep any charges or sums paid by you upon termination, if we agree to renew Service to you after discontinuing Service, you agree to pay any reactivation charges. Our remedies hereunder are not exclusive but are in addition to all other remedies provided by law.

5. **Modifying Your Account.** You may upon verbal or written notice to us add or delete Service features. Unless you have selected a special promotional rate plan or accepted promotional handset pricing, you may, upon verbal or written notice to us and payment of transfer fee (if any) approved by us, change to another rate plan beginning with the following billing cycle.

6. **Deposits.** We may require a deposit in which you agree to a security interest to ensure your payment of all charges due to us. Deposit amounts may be increased by us at any time upon termination of your usage and credit. You may either provide us such increased deposit or terminate this Agreement, in which case any cancellation fee will be waived. You must promptly pay your bills even if you have given us a deposit. If this Agreement is terminated for any reason, any deposit from you will be applied to pay any of your charges then or thereafter due. Any remaining deposit or other credit balance on your account will be refunded without interest (as allowed by law) to you at your last known address within ninety (90) days after termination. Unless otherwise prohibited by law, (a) any balances of five dollars (\$5.00) or less will not be returned but will automatically remain our property, and (b) if the Service is not able to deliver the funds to you and retains them to us, the fee to such funds shall be conclusively deemed to remain ours, and you shall have no further right thereto.

7. **Billing and Payment of Charges.** You will pay all charges for Service under this Agreement, including regular monthly Service and Usage charges. Usage charges include charges for a certain number of calls that are processed through your Unit or through any Number assigned to you, toll charges for calls you make from our local calling area to points outside our local calling area, long distance charges assessed by another service provider for calls that are sent from or received by your Unit when you are outside our local calling area (Country charges), any applicable taxes, and assistance, etc.), and additional calling services offered by us to you. You will be charged for Service features on a monthly basis, with any charges for a period of time not billed by us on a monthly basis.

We bill in full minute increments and any fraction of a minute of usage is rounded up and charged or deducted from any bucket minutes or a full minute rate. You will be charged from the time you send or receive the call until the time you press the key to end the call. If we have agreed that you may pay for charges with a credit card account, we will charge amounts due to the Service from your credit card account. If the charges are billed, even if Service has been terminated, no additional notice, consent or authorization will be required for such credit card account charges. To the extent allowed by law, such charges are irrevocable. If you have authorized us to charge amounts due to your credit card account, Paragraph 10 below shall extend to your use and ownership of the credit card account under the terms of the card issuer does not pay us, payment must be received from you on or before the due date, or we may suspend or terminate your Service without prior notice. Charges, including disputed amounts, must be paid by the date shown on the monthly invoice. You agree that (a) any of our charges (b) would be irrevocable to the extent amount of our charges to pay property; and (c) in the event of such failure, you shall pay us, including damages of one and one-half percent (1.5%) per month (or any portion thereof) of any amount not paid when due, plus interest. Damages shall be reduced or eliminated to the extent required by applicable law. We accept late or partial payment or payment marked "Paid in Full" without notation. If we do not receive payment by the date shown on the invoice, we will consider an account in default and we may charge you a returned check fee of twenty dollars (\$20.00) or such lesser amount as required by law for any check returned to us. Questions about or objections to any charges reflected on an invoice must be in writing and must be received by us from you no later than the payment due date or any objection shall be deemed waived.

8. **Taxes.** Any applicable sales, use, excise, public utility or other taxes, fees or charges imposed on us as a result of providing the Service or your Unit to you will be added to your charges when required by law. If you are exempt from payment of any such taxes, you may provide us with an original Tax Exempt Document. Tax exemption will only apply from the date we receive the Tax Exempt Document (you cannot receive credit for any taxes already paid by you).

9. **No Warranties.** AS IS, WE ARE NOT THE MANUFACTURER OF YOUR UNIT AND WE MAKE NO WARRANTIES REGARDING THE SERVICE OR YOUR UNIT, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, DURABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF ANY TYPE OR CHARACTER. ALL SUCH WARRANTIES ARE EXPRESSLY EXCLUDED. STATEMENTS REGARDING OR DESCRIPTIONS OF THE SERVICE OR YOUR UNIT, IF ANY, BY US OR OUR AGENTS OR INSTALLERS ARE INFORMATIONAL ONLY AND ARE NOT MADE OR GIVEN AS WARRANTY OF ANY KIND. THE MANUFACTURER'S WARRANTY, IF ANY, IS BETWEEN YOU AND THE MANUFACTURER; IT DOES NOT APPLY TO US, AND IT WILL NOT BE HONORED OR EXECUTED BY US.

10. **Limitation of Liability.** OUR NONPERFORMANCE HEREUNDER SHALL BE EXCLUDED AND WE SHALL NOT BE LIABLE IF CAUSED BY ACT OR OMISSION OF AN UNDERLYING SERVICE, EQUIPMENT OR FACILITY FAILURE, EQUIPMENT OR FACILITY UPGRADE OR RECONFIGURATION, ACTS OF GOD, STRIKE, FIRE, WAR, PLOT, GOVERNMENT ACTION, EQUIPMENT OR FACILITY SHORTAGE, EQUIPMENT OR FACILITY RELOCATION OR CAUSES BEYOND OUR REASONABLE CONTROL, INCLUDING WITHOUT LIMITATION THE FAILURE OF AN INCOMING OR OUTGOING CALL INCLUDING A 9-1-1 EMERGENCY CALL, TO BE CONNECTED OR COMPLETED. OUR LIABILITY, IF ANY, FOR ANY SERVICE, OMISSION, INTERRUPTION, DELAY, ERROR, DEFECT OR OTHER FAILURE WITH RESPECT TO THE SERVICE SHALL IN NO EVENT EXCEED THE AMOUNT OF THE PRORATED MONTHLY CHARGES TO YOU FOR SAID SERVICE DURING THE APPLICABLE PERIOD. PROVIDED THAT NO LIABILITY SHALL RESULT FOR OUTAGES OF 24 HOURS OR LESS. IN NO EVENT SHALL WE BE LIABLE TO YOU, YOUR EMPLOYEES, AGENTS OR CUSTOMERS, OR ANY THIRD PARTY (COLLECTIVELY FOR PURPOSES OF THIS PARAGRAPH, "SUBSCRIBER") FOR ANY COST, DELAY, OR INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH ANY FAILURE OF SERVICE OR NONPERFORMANCE UNDER THIS AGREEMENT. WE SHALL NOT BE LIABLE TO SUBSCRIBER FOR INJURY TO PERSONS OR PROPERTY ARISING FROM SUBSCRIBER'S USE OF YOUR UNIT OR THE SERVICE. WE SHALL NOT BE LIABLE TO SUBSCRIBER FOR INJURY TO PERSONS OR PROPERTY ARISING FROM ANY UNDERLYING CARRIER, AND ANY OF OUR OFFICERS, DIRECTORS, EMPLOYEES, AGENTS AND AFFILIATES MANAGE FROM AND AGAINST ANY AND ALL CLAIMS, ACTIONS, LIABILITIES, COSTS OR DAMAGES RELATING TO THIS AGREEMENT AND SUBSCRIBER'S USE OF THE SERVICE. YOU FURTHER AGREE TO PAY OUR REASONABLE ATTORNEY'S AND EXPERT WITNESS FEES AND COSTS ARISING FROM ANY ACTIONS OR CLAIMS HEREUNDER AND THOSE INCURRED IN ESTABLISHING THE APPLICABILITY OF THIS PARAGRAPH.

11. **Privacy.** Privacy cannot be guaranteed, and we shall not be liable to you for any lack of privacy you experience while using your Unit or the Service.

12. **Assignment.** We may assign in whole or in part our rights or duties under this Agreement without prior notice to you and upon such assignment we shall be released from all liability hereunder. We shall assign this Agreement only with our prior written consent. Subject to this restriction, this Agreement shall bind the heirs, successors, subcontractors, and assigns of the respective parties.

13. **Notice.** Written notice to you shall be considered given on the date deposited in the U.S. Mail addressed to you at your last known address as shown on the records file, unless notice is considered given when received at our address of record. Verbal notice shall be considered given on the date reflected in our billing system.

14. **Return Policy.** To be eligible for a return, your Unit must have been purchased from us and include its receipt and original packaging and contents, undamaged and in good working condition. If you meet these requirements, you may return your Unit within 30 days of the purchase date for a full refund of your purchase price. Your return may be subject to a restocking fee. If you do not meet these requirements, you may not return your Unit.

15. **Severability.** Should any part or portion of this Agreement be found invalid, the balance of the provisions shall remain unaffected and in full force and effect, unless our obligations hereunder are materially impaired.

16. **Mandatory Arbitration.** Any controversy, claim or dispute between you and us, including claims by us to collect unpaid charges, should be submitted to final, binding arbitration, the auspices of the American Arbitration Association pursuant to its published Wireless Industry Arbitration Rules, incorporated herein by this reference and available for reference at (800) 775-7879. Notice of arbitration shall be deemed to be given by the filing of a demand for arbitration with the American Arbitration Association.

# CELLULARONE

\_\_\_\_\_ You acknowledge that you have received a copy of the Cellular One Wireless Residential Service Agreement and agree to its terms and conditions.

\_\_\_\_\_ You agree that you will be fully liable for any damage to or loss of the Unit, up to its \$400 replacement value. This charge may be billed to your Cellular One account pursuant to the terms of your Service Agreement.

\_\_\_\_\_ You understand that your copy of this Agreement is your receipt, and must be presented when picking up your repaired equipment and/or returning the Unit.

## **Section 2**

# **North Dakota Public Service Commission Filings and Decisions**

*organized in reverse chronological order  
(January 15, 1999 – November 22, 2000)*

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Western Wireless Corporation vs.  
Consolidated Telephone Cooperative, Inc.  
Complaint**

**Case No. PU-1564-99-17**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND**

**November 22, 2000**

**Appearances**

Commissioners Bruce Hagen, Leo M. Reinbold and Susan E. Wefald

Gene DeJordy, Executive Director-Regulatory Affairs, Western Wireless Corporation, 3650 131<sup>st</sup> Avenue SE, Bellevue, Washington 98006 on behalf of Western Wireless Corporation.

Mark J. Ayotte, Briggs and Morgan, Attorneys at Law, 2200 First National Bank Building, 332 Minnesota Street, St. Paul, Minnesota 55101 on behalf of Western Wireless Corporation.

Michael J. Maus, Hardy, Maus, & Nordsven, P.C., Attorneys at Law, 137 First Avenue West, P.O. Box 570, Dickinson, North Dakota 58602-0370 on behalf of Consolidated Telephone Cooperative, Inc.

Michael A. Bosh, Pringle & Herigstad, P.C., Attorneys at Law, P. O. Box 1000, Minot, North Dakota 58702-1000 on behalf of Consolidated Telephone Cooperative, Inc.

William W. Binek, Chief Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505-0480 as Hearing Officer.

**Preliminary Statement**

On August 31, 1999, the Commission issued its Findings of Fact, Conclusions of Law and Order in this matter, deciding in favor of the complainant/appellee, Western Wireless Corporation (Western Wireless). Consolidated Telephone Cooperative (Consolidated) appealed to district court.

On a motion by Consolidated, the district court issued an order on January 18, 2000 admitting additional evidence into the record and remanding the matter to the Commission to consider the additional evidence and determine whether to amend or reject its initial findings of fact, conclusions of law and order. The additional evidence admitted by the district court on January 18, 2000 consisted of two documents obtained by Consolidated from Western Wireless through discovery in a separate proceeding. The two documents were the Cellular One wireless Residential Service Agreement and the Wireless Residential Service Demo/loaner Equipment Agreement.

On February 18, 2000, the district court granted the motion of Western Wireless to offer additional documents into the record. These additional documents were responsive to those admitted on the motion of Consolidated. The additional documents allowed into the record by the February 18, 2000 order were the Declaration of John M. Tedeschi explaining the reason for the language in the initial service agreements, a supplemental filing in Federal District court Case No. A1-99-006, an Addendum to the Cellular One Wireless Residential Service Agreement and an Addendum to the Wireless Residential Service Demo/Loaner Equipment Agreement.

On July 19, 2000, the Commission issued a Notice of Hearing, scheduling a hearing for July 31, 2000 to consider the additional evidence and determine the impact of the additional evidence on the initial decision. The hearing was subsequently rescheduled twice at the request of Western Wireless before being held on September 26, 2000.

### **Findings of Fact**

1. Prior to February, 2000, the service agreements that Western Wireless required of customers subscribing to its wireless residential service contained language indicating that the residential service unit was intended to remain stationary, that removing the unit from its original location was a violation of the agreement and that removing the unit would result in additional fees to the customer, failure of the unit and/or termination of the agreement.
2. The prohibitive language was removed from service agreements effective February, 2000 and at that time existing customers entered into an addendum to each agreement which removed the prohibitive language from their service agreements.
3. Consolidated argues that Western Wireless intended for the service unit to remain stationary rather than mobile and attempted to restrict mobility with the service agreement language. Consolidated contends that Western Wireless did so for the purpose of discouraging customers from substituting wireless residential service for traditional cellular service.

4. Western contends that the language in question was inserted into the agreements by Western Wireless's sales and marketing group for the purpose of ensuring optimum signal quality and strength when the service was new.

5. Service agreement language does not create, eliminate or revise the technical capabilities of the residential wireless service provided by Western Wireless.

6. Western Wireless's intent regarding mobility and its attempt to restrict mobility prior to February, 2000, do not create, eliminate or revise the technical capabilities of the residential wireless service provided by Western Wireless.

7. Neither the additional evidence made a part of the record by the district court, nor the evidence adduced at our September 26, 2000 hearing, causes us to revise our original determination that the Wireless Residential Service at issue in this proceeding is a mobile service.

### **Conclusions of Law**

1. The Commission has jurisdiction over this matter.

2. Neither the additional evidence made a part of the record by the district court nor the evidence adduced at our September 26, 2000 hearing causes us to revise our original determination that the wireless residential service at issue in this proceeding is a mobile service.

### **Order**

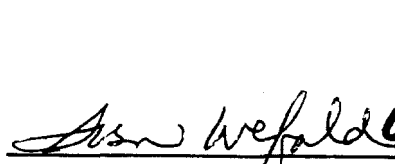
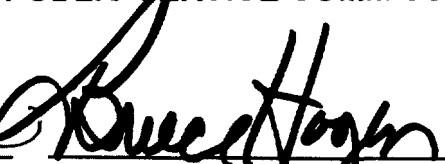

The Commission Orders:

1. The Findings of Fact issued by the Commission on August 31, 1999 are supplemented by the Findings of Fact in the instant order.

2. The Conclusions of Law issued by the Commission on August 31, 1999 are supplemented by the Conclusion of Laws in the instant order.

3. No other changes to the Commission's August 31, 1999 order shall be made.

### **PUBLIC SERVICE COMMISSION**

		
<b>Susan E. Wefald</b> Commissioner	<b>Bruce Hagen</b> President	<b>Leo M. Reinbold</b> Commissioner

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Western Wireless Corporation vs.  
Consolidated Telephone Cooperative, Inc.  
Complaint**

**Case No. PU-1564-99-17**

**AFFIDAVIT OF SERVICE BY CERTIFIED MAIL**

**STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH**

**Sharon Helbling** deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **24th day of November, 2000**, she deposited in the United States Mail, Bismarck, North Dakota, **four** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

**Supplemental Order**

The envelopes were addressed as follows:

Thomas D Kelsch  
Kelsch Kelsch Ruff & Kranda P L L P  
P O Box 1266  
Mandan ND 58554-1266  
**Cert. No. 7099 3400 0014 4513 6538**

L Dan Wilhelmson  
Consolidated Telephone Coop Inc  
507 South Main  
Dickinson ND 58601  
**Cert. No. 7099 3400 0014 4513 6521**

Michael J Maus  
Hardy Maus & Nordsven  
P O Box 570  
Dickinson ND 58602-0570  
**Cert. No. 7099 3400 0014 4513 6514**

Gene Dejordy  
Western Wireless Corporation  
3650 131<sup>st</sup> SE  
Bellevue WA 98006  
**Cert. No. 7099 3400 0014 4513 6507**

Each address shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me  
this **24th day of November, 2000**.

SEAL

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Notary Public

# Kelsch Kelsch Ruff & Kranda

C.F. Kelsch  
1890-1987

Attorneys at Law  
Mandan, North Dakota

WILLIAM C. KELSCH  
THOMAS F. KELSCH, P.C.  
ARLEN M. RUFF, P.C.  
THOMAS D. KELSCH, P.C.  
TODD D. KRANDA, P.C.\*  
TIMOTHY J. WAHLIN, P.C.  
ROB FORWARD, P.C.  
WILLIAM J. DELMORE

\*CLA Member

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P.O. Box 1266  
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\*Also Licensed in Minnesota

October 24, 2000

HAND DELIVERED  
PUBLIC SERVICE COMMISSION  
12<sup>TH</sup> & 13<sup>TH</sup> FL DEPT 408  
600 E BLVD AVE  
BISMARCK ND 58505

RE: Western Wireless Corporation v. Consolidated Telephone Cooperative  
Case No. PU-1564-99-17  
Our File No. 8451

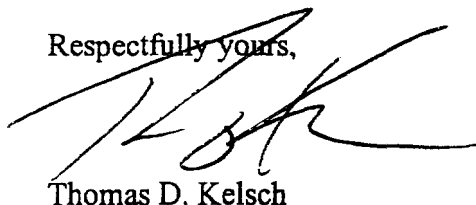
Ladies or Gentlemen:

Enclosed for filing are the original and seven copies of the following documents:

1. Findings of Fact, Conclusions of Law, Order;
2. Western Wireless Corporation's Supplemental Brief; and
3. Affidavit of Service by Mail.

Thank you for your attention to this matter. If you have any questions please contact me.

Respectfully yours,



Thomas D. Kelsch

ve  
Encs

c: Western Wireless Corporation  
Mark Ayotte, Esq.



**STATE OF NORTH DAKOTA**

**BEFORE THE PUBLIC SERVICE COMMISSION**

WESTERN WIRELESS CORPORATION vs.  
CONSOLIDATED TELEPHONE  
COOPERATIVE, INC. COMPLAINT

)  
)  
)

CASE NO. PU-1564-99-17

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER**

**A P P E A R A N C E S**

**COMMISSIONERS PRESENT:**

COMMISSIONER BRUCE HAGEN  
COMMISSIONER LEO M. REINBOLD  
COMMISSIONER SUSAN E. WEFALD

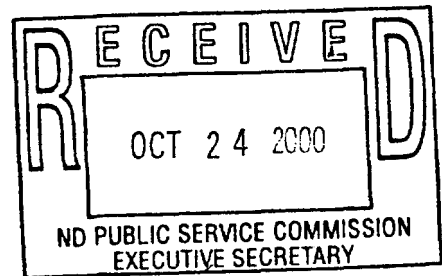
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MR. GENE DEJORDY of  
Western Wireless  
Vice President, Regulatory Affairs  
Attorney at Law  
3650 131<sup>st</sup> Avenue Southeast  
Bellevue, Washington 98006

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MR. THOMAS D. KELSCH  
Kelsch, Kelsch, Ruff & Kranda  
Attorneys at Law  
103 Collins Avenue  
P.O. Box 1266  
Mandan, ND 58554-7266

----- and -----



**A P P E A R A N C E S (Continued)**

MR. MARK J. AYOTTE of  
Briggs and Morgan  
Attorneys at Law  
2200 First National Bank Building  
332 Minnesota Street  
St. Paul, Minnesota 55101

FOR WESTERN WIRELESS CORPORATION

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P.O. Box 570  
Dickinson, North Dakota 58602-0570

----- and -----

MR. MICHAEL A. BOSH of  
Pringle & Harigstad, P.C.  
Attorney at Law  
Bremer Bank Building  
P.O. Box 1000  
Minot, North Dakota 58702-1000

FOR CONSOLIDATED

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MS. ILLONA A. JEFFCOAT-SACCO  
Public Service Commission  
State Capital  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505-0480

FOR THE COMMISSION STAFF.

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### Preliminary Statement

1. This docket commenced January 15, 1999 when Western Wireless filed a Complaint with the Commission because Consolidated had unilaterally disconnected Western Wireless' interconnection service which disrupted telephone service for Western Wireless customers. In its Complaint, Western Wireless alleged that Consolidated unlawfully shut off service necessary to serve customers in Regent, North Dakota with a wireless local loop. On January 20, 1999, the Commission concluded the Complaint stated a *prima facie* case and moved to serve the Complaint on Consolidated.

2. On February 9, 1999, Consolidated answered the Complaint and asserted a Counterclaim. In its Counterclaim, Consolidated alleged that Western Wireless was a competitive local exchange carrier and therefore operating illegally because it did not have a certificate of convenience and necessity ("CPCN") from the Commission. Even though lack of a CPCN would not justify the illegal disconnection of service, Consolidated's Counterclaim raised the issue of whether Western Wireless needed a CPCN to provide its wireless local loop service, called wireless residential service ("WRS"), in Regent. On March 3, 1999, Western Wireless filed its Answer to the Counterclaim and moved to dismiss the Counterclaim because the State is preempted under federal law from imposing any CPCN requirement on CMRS providers such as Western Wireless.

3. On March 10, 1999, the Commission held a formal evidentiary hearing. Western Wireless sponsored the testimony of Kim Schmidt, Special Projects Manager for Western Wireless. Consolidated sponsored the testimony of Douglas Meredith, director of economics and pricing division of John Staurulakis, Inc., and Dan Wilhelmson, CEO and General Manager of Consolidated.

4. The Commission issued its Findings of Fact, Conclusions of Law and Order on August 31, 1999 (the "Order"). Based on the record evidence, the Commission determined

Consolidated violated two State statutes and the North Dakota Administrative Code when it disconnected service to Western Wireless. Specifically, the Commission found Consolidated violated N.D.C.C. § 49-21-07, which prohibits any telecommunications company from discriminating against another carrier. (Order, p. 6). The Commission further concluded Consolidated violated N.D.C.C. § 49-21-10, which provides that "every telecommunications company operating in this state shall receive, transmit, and deliver, without discrimination or delay, the telecommunications of every other telecommunications company with which a connection has been made." (Order, p. 7). Finally, the Commission determined that Consolidated contravened North Dakota Admin. Code § 69-09-05-02 which requires a utility to give advance notice before disconnecting service. (Order, pp. 4-5). For these violations, the Commission imposed a \$15,000 fine on Consolidated. (Order, p. 12).

5. The Commission additionally concluded Western Wireless is not required to obtain a CPCN because its WRS is a mobile service governed by federal law. Based on the evidence, the Commission found that Western Wireless' WRS has mobile capabilities and is therefore a mobile service. Thus, the Commission concluded the State is federally preempted from imposing rate or entry regulation on Western Wireless' service under 47 U.S.C. § 332(c)(3)(A) and may not require Western Wireless to obtain a CPCN. (Order, p. 12). Accordingly, the Commission dismissed Consolidated's Counterclaim. (Id.).

6. On September 14, 1999, Consolidated filed a Petition for Reconsideration with the Commission. The Commission did not act on Consolidated's petition within 30 days and it was deemed denied by operation of N.D.C.C. § 28-32-14.

7. Consolidated then appealed the Commission's decision to the South Central Judicial District Court. During the appeal, Consolidated sought to offer into evidence two additional

documents. The first additional document is a copy of a WRS Demo/Loaner Equipment Agreement ("Equipment Agreement") (Consolidated Ex. 6). The second additional document is a copy of a Wireless Residential Service Agreement ("Service Agreement") (Consolidated Ex. 7). These documents were obtained by Consolidated through discovery in a federal antitrust lawsuit Western Wireless brought against Consolidated for its unlawful disconnection of service.

8. The District Court granted Consolidated's request and accepted the Service Agreement and Equipment Agreement as evidence. On January 18, 2000, without further action, the District Court referred the matter back to the Commission to consider whether to "amend or reject" its initial Order in light of the additional evidence offered by Consolidated.

9. Western Wireless also brought a motion asking the District Court to accept two additional documents into evidence, which request the District Court granted on February 18, 2000. The first additional document is an Addendum to the Cellular One Wireless Residential Service Agreement ("Service Agreement Addendum"), which is Western Wireless' Exhibit 1 in this proceeding. The second additional document is an Addendum to the Wireless Residential Service Demo/Loaner Equipment Agreement ("Equipment Agreement Addendum"), which is Western Wireless' Exhibit 2 to this proceeding. The effect of the Service Agreement Addendum and Equipment Agreement Addendum is to negate the provisions of the additional evidence offered by Consolidated.

10. Pursuant to the District Court's referral, a further evidentiary hearing was held before the Commission on September 26, 2000. Western Wireless sponsored the testimony of RaeAnn Kelsch, Manager of External Relations at Western Wireless. Consolidated sponsored the testimony of Mr. Wilhelmson.

#### **Findings of Fact**

1. Western Wireless is licensed by the FCC to provide wireless telecommunication services to customers in North Dakota.

2. Western Wireless is a provider of WRS service in Regent.

3. Western Wireless provisions its WRS service using a Telular wireless access unit. This unit can be operated using AC power or battery backup and is fully operational in either the stationary or mobile mode. This technical capability enables a customer to take the phone to a neighbor's house, to the office or out in the field. This mobility is an attractive feature of the WRS service.

4. When Western Wireless launched its WRS service in Regent and continuing through February 2000, Western Wireless utilized the Equipment Agreement (Consolidated Ex. 7) and the Service Agreement (Consolidated Ex. 6) with its Regent customers. These agreements contain the following language:

The Unit is intended to remain stationary. Removing the Unit from the location where it was installed by us in violation of this Agreement will result in substantial additional fees to you, failure of the Unit, and/or termination of this Agreement.

5. Western Wireless' Sales and Marketing Group initially inserted the language because Regent was a test market for Western Wireless' new deployment of WRS. The Sales and Marketing Group wanted to ensure optimum signal quality and believed signal strength could be optimized if customers were advised not to move the wireless access unit.

6. In February 2000, every Regent customer of Western Wireless signed an Addendum to Equipment Agreement and Addendum to Service Agreement. These addenda deleted, in its entirety, this language in each of the agreements.

#### **Consolidated's Claims**

7. Consolidated asserts that the Commission should reverse its earlier Order because the Service Agreement and the Equipment Agreement somehow demonstrate that Western Wireless' WRS is a fixed service. Therefore, Consolidated argues, Western Wireless is required to have a CPCN. Consolidated further argues that the Federal Communication Commission's ("FCC") most recent order on CMRS services supports this conclusion. See In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, Second Report and Order and Order on Reconsideration, FCC 00-246 (July 20, 2000) ("CMRS Flexibility Second Report and Order").<sup>7</sup>

#### **The Service Agreement and the Equipment Agreement**

8. Consolidated's reliance on the language of the Service and Equipment Agreements is misplaced. The language in these agreements does not change the fact that WRS is mobile or the correctness of the Commission's prior determination that Western Wireless' service is a CMRS offering. First, the language does not describe or change the technical capabilities of the service and cannot be relied upon for such a proposition. Mr. Wilhelmson agreed the language in the agreements has no bearing on WRS' mobility. (Sept. Tr. 26). The testimony of Western Wireless' witness Ms. Schmidt at the March 10, 1999 hearing further confirms WRS is a mobile service, no matter how it is described in the Service Agreement or Equipment Agreement. Just like Western Wireless' conventional cellular service, the WRS service is provided over the same network, the same switching equipment, the same interconnection facilities, the same cell sites and cell site radio equipment and it utilizes the same CMRS radio frequency spectrum as conventional cellular service. Instead of a bag phone or handheld phone, WRS customers use a Telular wireless access unit, which can be operated using AC power or battery backup. Ms. Schmidt specifically demonstrated that the equipment operates in the mobile mode. She explained:

An important attribute of wireless residential service is its mobility. Unlike landline service, and like conventional cellular service, wireless residential service is a service associated with a customer, not a specific location. This feature of wireless residential service allows a customer to take its phone to a neighbor's house, to the office, or another building or out in the field. Because the unit operates on either AC power or battery backup, it is mobile.

9. Second, as a practical matter, describing the wireless access unit in an agreement as "intended to remain stationary" does not make it so. WRS is what it is regardless of how it might be described in the Service Agreement or Equipment Agreement. Ms. Kelch's testimony explained the genesis of the language in the Equipment and Service Agreements. It had a limited marketing purpose and was never intended to describe or limit WRS's actual mobile capabilities or technical operating characteristics.

10. Ms. Kelsch testified in detail at the September 26, 2000 hearing regarding the language in the two agreements. The Sales and Marketing Group initially inserted the language because Regent was a test market for Western Wireless' new deployment of WRS. The Sales and Marketing Group wanted to ensure optimum signal quality. Ms. Kelsch stated the Marketing Group believed signal strength could be optimized if customers were advised not to move the wireless access unit. She explained:

By seeking to discourage customers from moving the equipment from its original location, the company actually sought to maintain a consistent, high level of signal quality to the customers, and this was especially true at the time the service was initially deployed because it was a new service offering and the company was unsure of what type of signal we would have, and we wanted to ensure that our customers received the optimum service. So this language, no matter how well-intentioned, was subsequently deleted from this agreement to leave no question to the mobility of the service.

11. Thus, the language relied on by Consolidated was originally placed in the Service and Equipment Agreements, not because of any technical or practical limitations of the mobility of the WRS service or equipment, but to ensure the best possible signal strength for customers. Moreover,



the WRS is the same type of service currently deployed to approximately 1,500 customers in Minnesota, Kansas, Nevada and Texas. None of the agreements in those states includes the language relied upon by Consolidated.

12. Thus, neither the Service Agreement nor the Equipment Agreement supports Consolidated's argument that WRS is a fixed service. Even if they did, Consolidated's related arguments have been mooted by their subsequent amendment.

13. In sum, Consolidated has offered no evidence to dispute the actual mobility of the WRS service and the Telular unit. When the Commission issued its original Order, the Telular wireless access unit could be, and was, picked up and moved by Western Wireless' customers. Today, the wireless access unit can be and is picked up and moved by Western Wireless' customers. The Commission reaffirms its earlier Order that Western Wireless' service is a mobile cellular service.

#### **FCC Directives Regarding CMRS Determinations**

14. The Commission's finding that Western Wireless' service is a mobile cellular service exempt from any CPCN requirement is consistent with federal law and the FCC directives regarding CMRS service. CMRS services are expressly exempt from State entry and rate regulation. (Order, p. 9). Section 332(c)(3)(A) of the Communications Act of 1934 (the "Act"), as amended, provides in pertinent part as follows:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (emphasis added).

15. The FCC's existing rules allow CMRS licensees to provide all forms of mobile services on their assigned CMRS spectrum. The Act's definition of the term "mobile service" includes a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." 47 U.S.C. § 153(27). The FCC's regulations define a "mobile station" as "[o]ne or more transmitters that are capable of operation while in motion." 47 C.F.R. § 22.99 (emphasis added).

16. Further, services provisioned utilizing dual-use equipment are classified by the FCC as "mobile" services. (Order, pp.10-11). As the Commission previously recognized in the Order, "Services provided through dual-use equipment . . . which are capable of transmitting while the platform is moving, are included in the mobile services definition." (Order, p. 11). In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Service, GN Docket No. 93-252, 9 FCC Record 1411, Second Report and Order (March 7, 1994).

17. In 1996, the FCC reaffirmed that services with both fixed and mobile capabilities are "mobile" services under federal law. Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd. 8965 (June 27, 1996) ("CMRS Flexibility Order/FNPRM"). Specifically, the FCC reiterated its conclusion that auxiliary or incidental services provided through dual-use equipment are "mobile" for purposes of the Act and exempt from State regulation.

In reviewing the definition of "mobile service" under the Communications Act, we have concluded that services having both fixed and mobile capabilities, e.g. services provided through dual-use equipment, fall within the statutory definition. In contrast, we have concluded that services that are solely fixed in nature, e.g. fixed point-to-point services such as Basic Exchange Telephone Radio Service (BETRS) do not constitute "mobile service" within the meaning of the statute.

CMRS Flexibility Order/FNPRM at 7 (footnotes omitted) (emphasis added).

18. Based on the foregoing and the record evidence, the Commission determined that "WRS has mobile capabilities and is therefore a mobile service." (Order, p. 11). The federal law and the FCC's regulations governing CMRS determinations have not changed since the issuance of the Commission's Order. The relevant federal rules and FCC orders still control and a CMRS offering is still preempted under 47 U.S.C. § 332(c)(3)(A) from any certification requirement.

19. Consolidated's reliance on the CMRS Flexibility Second Report and Order is unavailing because it did not alter the FCC's regulatory framework previously analyzed by the Commission. In 1996, the FCC adopted new regulations to expand permitted offerings of fixed wireless service by CMRS providers. See CMRS Flexibility Order/FNPRM. Specifically, the FCC amended its rules to allow service providers using spectrum allocated for CMRS to provide fixed services on a co-primary basis with mobile services. The changes were designed to allow service providers to choose to provide exclusively fixed services, exclusively mobile services or any combination of the two. CMRS Flexibility Order/FNPRM at ¶ 24. As it relates to a cellular carrier, the FCC modified the language of 47 C.F.R. 22.901(d) to authorize fixed services on a co-primary basis.

20. The FCC's decision to allow co-primary fixed use of CMRS spectrum initially raised the related issue of how such fixed service offerings would be classified for regulatory purposes. The FCC did not adopt any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term "co-primary." CMRS Flexibility Order/FNPRM, ¶ 24. Rather, the FCC proposed to establish a rebuttable presumption that licensees offering fixed wireless services over CMRS spectrum are within the definition of CMRS and consequently would be regulated as CMRS. CMRS Flexibility Order/FNPRM at ¶ 53-54. The proposed rebuttable presumption would have

applied to fixed wireless service applications offered over frequency bands in conjunction with CMRS offerings. Under this proposed approach, the FCC would allow an interested party to challenge a presumption regarding a particular fixed wireless service to determine whether the FCC would regulate the particular offering as CMRS. CMRS Flexibility Order/FNPRM at ¶ 54.

21. The FCC's proposed treatment of fixed wireless services offered on a co-primary basis in the CMRS Flexibility Order/FNPRM did nothing to alter the regulatory treatment of CMRS licensees under the FCC's previously existing rules. The FCC clearly stated:

At the outset, we emphasize that our decision to allow carriers to offer co-primary fixed services on spectrum allocated for CMRS does not alter in any way our regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules. In the CMRS Second Report and Order, we stated that ancillary, auxiliary, and incidental services offered by CMRS providers fall within the statutory definition of mobile service, and are subject to CMRS regulations. We reaffirm that determination here. In our order today, however, we have broadened the potential scope of fixed services that may be offered by CMRS providers. We therefore seek further comment on the regulatory treatment of such fixed services that may not be considered ancillary, auxiliary or incidental to mobile service.

CMRS Flexibility Order/FNPRM at ¶ 48 (emphasis added). Consequently, the FCC's prior determinations relating to the CMRS status of "mobile service," including service using a "mobile station" capable of operating while in motion under 47 C.F.R. § 22.99, and ancillary or incidental services under 47 C.F.R. § 22.07, were unaffected by the FCC's proposed rebuttable presumption.

22. The FCC's recent CMRS Flexibility Second Report and Order similarly has no bearing on the issues in this proceeding. It does not disturb the scope of federal preemption from State entry or rate regulation under 47 U.S.C. § 332(c)(3)(A). It does not modify the FCC's prior determinations of "mobile service," including the regulatory treatment of CMRS licensees offering ancillary and incidental fixed services under existing FCC regulations. Moreover, it does not change the CMRS regulatory treatment of services provided through dual-use equipment.

23. The focus of the FCC's recent CMRS Flexibility Second Report and Order is on the provisioning of "fixed wireless services on a co-primary basis" with commercial mobile radio services. It does not address or change the regulatory treatment of dual-use equipment such as the wireless access unit used by Western Wireless to provision WRS in Regent. The review of prior FCC directives relating to CMRS status demonstrates that the CMRS Flexibility Second Report and Order has not changed the mobile cellular service status of services provided through dual-use equipment.

24. Rather, the recent CMRS Flexibility Second Report and Order merely reflects the FCC's decision not to adopt the rebuttable presumption proposed in the CMRS Flexibility/FNPRM when addressing a fixed service offered on a co-primary basis. It does not establish any reverse presumption that a fixed offering on a co-primary basis is not regulated as CMRS. Instead, the CMRS Flexibility Second Report and Order simply states that any determination of whether a fixed service being offered on a co-primary basis by a CMRS licensee is exempt from State entry and rate regulation will be made on a case-by-case basis.

25. Consolidated has not met its burden of proof. The two documents offered by Consolidated do not warrant reversal of the Commission's prior determination that Western Wireless' WRS is a CMRS service.

26. The Commission finds that it properly dismissed Consolidated's Counterclaim because Western Wireless' WRS offering is a CMRS service and Western Wireless is therefore exempt from a CPCN requirement.

### **Conclusions of Law**

1. Any of the foregoing Findings of Fact more appropriately characterized a Conclusion of Law is hereby restated as a Conclusion of Law.

2. The Commission has jurisdiction of the parties in this matter.
3. Consolidated has offered no evidence or argument warranting reversal of the Commission's prior Order. That Order should be affirmed.

**Order**

The Commission Orders:

The Commission's August 31, 1999 Order is AFFIRMED.

**PUBLIC SERVICE COMMISSION**

\_\_\_\_\_  
Susan E. Wefald  
Commissioner

\_\_\_\_\_  
Bruce Hagen  
President


\_\_\_\_\_  
Leo M. Reinbold  
Commissioner

**STATE OF NORTH DAKOTA**

**BEFORE THE PUBLIC SERVICE COMMISSION**

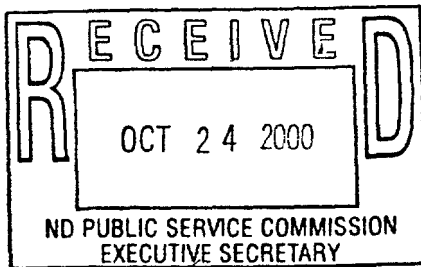
WESTERN WIRELESS CORPORATION vs. ) CASE NO. PU-1564-99-17  
CONSOLIDATED TELEPHONE )  
COOPERATIVE, INC. COMPLAINT )

**WESTERN WIRELESS CORPORATION'S SUPPLEMENTAL BRIEF**



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**STATE OF NORTH DAKOTA**

**BEFORE THE PUBLIC SERVICE COMMISSION**

WESTERN WIRELESS CORPORATION vs.	)	CASE NO. PU-1564-99-17
CONSOLIDATED TELEPHONE	)	
COOPERATIVE, INC. COMPLAINT	)	

**WESTERN WIRELESS CORPORATION'S SUPPLEMENTAL BRIEF**

**I. INTRODUCTION**

Western Wireless Corporation ("Western Wireless") submits this brief on the effect of additional evidence offered by Consolidated Telephone Cooperative, Inc. ("Consolidated") in this proceeding. The Public Service Commission ("Commission") should reject the assertions of Consolidated and reaffirm its earlier decision that Western Wireless is not required to obtain a certificate of public convenience and necessity ("CPCN"). The additional evidence offered by Consolidated does not in any way change the mobile nature of Western Wireless' service or the technological characteristics of the wireless access unit. Moreover, the additional evidence relied on by Consolidated has been completely negated by the subsequent amendment of the documents. The Commission has rightly determined Western Wireless' wireless local loop offering is a commercial mobile radio service ("CMRS") and therefore exempt from rate and entry regulation by the State of North Dakota. Accordingly, the Commission dismissed Consolidated's Counterclaim. Nothing put forth by Consolidated in the supplemental hearing warrants a reversal of this previous decision.